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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Harold Drennen,) No. CV-04-0802-PHX-DGC

10 Plaintiff,) **ORDER**

11 vs.)

12 Sentinel Real Estate Corporation, et al.,)

13 Defendants.)

15 Defendants Sentinel Real Estate, et al., seek summary judgment on Plaintiff's only
16 remaining claim, Count IV, alleging intentional violation of the Fair Labor Standards Act
17 by refusal to pay overtime. Doc. #31. The Court previously dismissed Counts I, II, and
18 III of Plaintiff's complaint as untimely. Doc. #14. For the reasons stated below,
19 Defendant's motion for summary judgment will be granted.

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Background

21 On June 14, 2005, Defendants served on Plaintiff a set of Requests for Admissions
22 under Rule 36 of the Federal Rules of Civil Procedure. Doc. # 32, Ex. 1. Rule 36(a) required
23 Plaintiff to respond by July 17, 2005. Plaintiff did not respond. On July 29, 2005, defense
24 counsel wrote to Plaintiff's counsel and noted that Plaintiff had not responded to
25 discovery, including the Requests for Admissions. Doc. #39, Ex. C. Plaintiff still did not
26 respond. *Id.* at 2. On August 18, 2005, defense counsel wrote again, noting that Plaintiff's
27 counsel had not responded to several letters and had not provided a disclosure statement.
28 *Id.*, Ex. D. Plaintiff did not respond to the Requests for Admission until September 28, 2005.

1 Doc. #38.

2 Defendants move for summary judgment on the ground that Plaintiff's failure to
3 respond to the Requests for Admissions within the rule-specified time period constitutes
4 an automatic admission of the requests under Rule 36(a). As a result, Defendants contend,
5 Plaintiff has admitted that Defendant paid him for all hours worked, including overtime, and
6 there is no triable issue of fact on Plaintiff's alleged Labor Act violation.

7 **Discussion**

8 Failure to timely respond to requests for admission results in admission of the
9 matters requested. Fed. R. Civ. P. 36(a); *see O'Campo v. Hardisty*, 262 F.2d 621, 622 (9th Cir.
10 1958) (granting summary judgment on the basis of implied admissions and pleadings.) No
11 motion to establish the admissions is needed. Rule 36 is self-executing. *Id.*; *Federal Trade*
12 *Comm'n v. Medicor, LLC.*, 217 F.Supp.2d 1048, 1053 (C.D. Cal. 2002). Any matter admitted
13 pursuant to Rule 36 is "conclusively established unless the court on motion permits
14 withdrawal or amendment of the admission." Fed. R. Civ. P. 36(b). Rule 36(b) establishes
15 the exclusive remedy for withdrawal or amendment of admissions and provides that a court
16 may do so only "on motion." *Id.*; *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir.
17 1987) ("[t]he proper procedural vehicle through which to attempt to withdraw admissions
18 made in these circumstances is a motion under Rule 36(b)").

19 Plaintiff did not respond to the Requests for Admission within the time required by
20 Rule 36(a) and thereby admitted the requests under the clear terms of the rule. Plaintiff has
21 not filed a Rule 36(b) motion to withdraw or amend its admissions and provides no
22 explanation for its failure to respond timely. Plaintiff appears to suggest that he did not
23 need to respond because his verified complaint denies the allegations set forth in the
24 requests (Doc. #36 at 4), but he cites no authority for this novel proposition and case law
25 holds that Rule 36 admissions trump conflicting evidence on summary judgment. *See*
26 *Cook v. Allstate Ins. Co.*, 337 F.Supp.2d 1206, 1214 (C.D. Cal. 2004) (stating that failure to
27 challenge admissions until reply brief or oral argument on appeal is "too late"); *see also*
28 *Kasuboski*, 834 F.2d at 1350 (stating that "a party cannot attack issues of fact established

1 in admissions by resisting a motion for summary judgment Rule 36 allows parties to
2 narrow the issues to be resolved at trial by effectively identifying and eliminating those
3 matters on which the parties agree. This function would be lost if parties were permitted
4 to contest under Rule 56 a matter concluded under Rule 36.”)

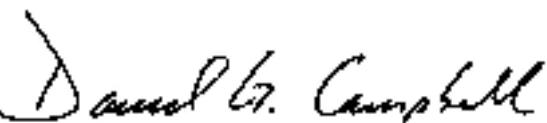
5 Summary judgment is appropriate if the evidence, viewed in the light most favorable
6 to the nonmoving party, “show[s] that there is no genuine issue as to any material fact and
7 that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see*
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Jesinger v. Nev. Fed. Credit Union*,
9 24 F.3d 1127, 1130 (9th Cir. 1994). By failing to respond to the Requests for Admissions
10 Plaintiff has admitted that Defendants paid him for all overtime hours at the appropriate
11 statutory rate. There is, therefore, no factual dispute that would support a Fair Labor
12 Standards Act violation and the Court will grant Defendants’ motion for summary
13 judgment.

14 **IT IS SO ORDERED** that Defendants’ Motion for Summary Judgement (Doc. #31)
15 is granted.

16 **IT IS FURTHER ORDERED** that the Clerk of the Court shall terminate this action.

17 DATED this 9th day of December, 2005.

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David G. Campbell
United States District Judge